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August 31, 2021

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Jim Hutmacher, Chairman  
DANR – Water Management Board  
Foss Building  
523 East Capitol Ave.  
Pierre, SD 57501-3182

Re: In the Matter of Water Permit Application #2685-2 and 2686-2;  
In the Matter of 2012 Ground Water Discharge Plan Application Submitted by  
Powertech, USA, Inc.

Dear Mr. Hutmacher:

Enclosed please find a copy of Powertech's Reply Brief in Support of Motion to Amend  
Procedural Order and Response to Motion to Permit Electronic Filing.

Sincerely,

*/s/ Matthew E. Naasz*

Matthew E. Naasz

MEN:klk  
Enclosure

cc: All Parties of Record Noted on Certificate of Service  
cc via e-mail: Ann Bailey, Steve Blair and David McVey, Assistant Attorneys General  
Ron Duvall

<sup>1</sup> The Board received letters from the Mayor of Hot Springs and the President of the Board of Trustees for Buffalo Gap. Neither of these municipalities are intervenors in this matter. Powertech, therefore, requests that their submissions not be considered in response to this motion.

Instead of restating its previous arguments at length within this brief, Powertech incorporates them herein.

### **ARGUMENT**

1. It is time to move forward with State permitting.

Powertech's initial briefing has exhaustively addressed this issue. As noted throughout Powertech's briefing, the State Boards have an independent obligation to address the applications pending in front of them. Powertech has met all of the State requirements for these permits to go forward. As recognized by the Programs, "there is no legal impediment to restarting these proceedings at this time." Response of Programs at 5. Likewise, neither the CWA nor the Intervenors have provided any authority that would allow this Board to indefinitely delay these proceedings while the NRC License and the EPA permits are under appeal.

As of July 22, 2021, final briefing regarding the NRC License has been submitted to the D.C. Circuit Court of Appeals. Currently, the proceedings before the Environmental Appeals Board ("EAB") regarding the injection well permits are on hold until the D.C. Circuit rules on the application of the National Historic Preservation Act under the NRC license. The proceedings regarding the Aquifer Exemption are held in abeyance before the Eighth Circuit Court of Appeals pending resolution before the EAB. As noted in Powertech's initial Brief on this matter, the issuance of the Aquifer Exemption is not stayed pending the Eighth Circuit's determination. Because of this, Powertech has not and will not receive any substantive rulings at the federal level until the

D.C. Circuit Court ruling and it is unknown when any rulings will be forthcoming.

The continued delays at the federal level, however, should not serve to exacerbate delays in the overall permitting process. The federal delays do not require additional delay in the overall project. The NRC license is fully effective. As such, approvals from the State of South Dakota would allow construction on the project to be conducted in parallel with the federal appeals. Construction of the injection wells and operation of the project must wait for EAB resolution, but it is not the case that the federal appeals prevent Powertech from moving ahead with other aspects of project construction. Requiring Powertech to wait for all federal appeals to be exhausted before the resumption of State permitting would, therefore, prejudice Powertech.

2. Substantive arguments should be addressed at a later date.

A number of the submissions from Intervenors raise questions such as the amount of water that Powertech intends to use, water availability, reclamation, and the nature of the underlying geology. For the water permit applications, a majority, if not all of these questions, have been addressed in the Reports to the Chief Engineer. The hearing process will allow Intervenors the opportunity to inquire further on these matters. The hearing process allows parties the opportunity to present evidence and testimony relevant to the applications at issue. See SDCL 46-2A-2 (recommendations of Chief Engineer to be scheduled for hearing); SDCL 46-2A-7 (Water Management Board to consider evidence at hearing). For those wishing to further educate

themselves prior to the hearing, however, the Reports to the Chief Engineer and the Recommendation of the Chief Engineer for the Water Permit

Applications Nos. 2685-2 and 2686-2 may be found here:

<https://denr.sd.gov/powertech/wmb/Powertechreportrecommaffidavitpetitions.pdf> . Powertech welcomes the opportunity to address such relevant issues at

hearing, but respectfully asserts that arguments regarding substantive issues are not appropriate at this time.

### 3. Location of Hearing.

As noted previously, Powertech takes no position on where the hearing should be located. Powertech would defer to the Board to determine whether the spatial and technological needs of the parties can be met at the various locations under consideration. With the ever-evolving nature of COVID-19, Powertech recognizes that certain precautions may need to be put in place to help preserve the health of the parties, and other interested persons, including the utilization of larger spaces or remote communications to facilitate social distancing.

### 4. Service by mail and electronic means.

On August 18, 2021, Hearing Officer Freeman entered an Order requiring the parties of record to update their contact information by September 13, 2021. Powertech has had numerous filings returned in the mail due to incorrect or outdated addresses indicated on the service list. Powertech currently has no option but to use the existing service list and agrees that the mailing information for the parties needs to be updated in order avoid the

waste that is occurring. Pursuant to the Board's Order, the "[f]ailure of a party to provide any needed updates to their contact information will result in the removal of that party of record list." The Order continues by stating that "[i]f your contact information is accurate, no action is needed." Despite this Order, there may be a number of intervenors who do not update their contact information even though the information is no longer correct or is outdated.<sup>2</sup> In those instances, mailings will continue to be sent only to be returned to the sender. In order to address this issue, Powertech would request that the addresses reflected on mail returned after September 13, 2021, be removed from the service list. And that the parties associated with those addresses be removed from the parties of record list unless those parties have provided a new address for service. Powertech anticipates this process would substantially cut down on the number of superfluous mailings.

With regard to the Motion to Permit Electronic Service, Powertech is aware that service by email has been permitted for certain proceedings. But electronic service does not appear to be an option in this instance. Chapter 46-2A entitled "Administrative Procedure for Appropriation of Water" contains a statute specific to service. SDCL 46-2A-6 provides:

Service and filing of pleadings, petitions, and motions.  
The originals of all pleadings, including petitions to contest, petitions to intervene, and motions, shall be filed with the chief engineer and served upon other parties, either personally or by mail. The chief engineer shall provide copies to all Water Management Board members. Service and filing by mail shall be deemed complete upon mailing. Any comment filed pursuant to subdivision 46-2A-

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<sup>2</sup> This may include Intervenors who moved from the State or may have passed away.

4(7) shall be provided by the chief engineer to all Water Management Board members and become part of the public record.

As provided in the statute, “[t]he originals of all pleadings, including petitions to contest, petitions to intervene, and motions, **shall** be filed with the chief engineer and served upon other parties, either personally or by mail.” The use of “shall” illustrates that service in the manner directed – either personally or by mail – is mandatory rather than permissive. *Reck v. S. Dakota Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 12, 932 N.W.2d 135, 139 (“as a rule of statutory construction, we have determined that ‘when shall is the operative verb in a statute, it is given obligatory or mandatory meaning.’” (citations omitted)). Given the above, it would not appear the Board has the option to allow electronic service.

5. The time for designation of party status and the intervention deadline has passed.

As discussed in Powertech’s Reply to the Programs’ Response in Opposition to Proposed Amendment of the Procedural Order, the contested case portion of the hearings in this matter has already started. See Reply at 7-8. It is simply too late in this process to reassign participation status. The time for intervention has also passed. Pursuant to the statutes and rules governing these hearings, the intervention deadline was set as November 26, 2012. Notice of Powertech’s applications and the intervention deadline was published in the local papers in the affected area. Those publications likewise noticed November 26, 2012 as the intervention deadline. See Affidavits of Publication at: <https://denr.sd.gov/powertech/wr/Powertechaffidavits.pdf>

SDCL 46-2A-4(4)(c) requires that any petition to oppose the water permit applications must be filed with the chief engineer and the applicant within ten days of the published notice. Powertech is seeking to resume hearings in this matter and the deadline to intervene in this matter has long passed. SDCL 46-2A-4 does not allow for two intervention periods.

### **CONCLUSION**

Based on the arguments and authorities presented in its previous filings, and this brief, Powertech respectfully requests that this Board amend the Procedural Order in a manner to allow Powertech to present its case to this Board and which allows the parties a reasonable opportunity to address Powertech's pending applications.

Dated: August 3/, 2021.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

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STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER )  
PERMIT APPLICATIONS 2685-2 )  
And 2686-2, POWERTECH (USA), INC. )  
 )  
IN THE MATTER OF THE 2012 )  
GROUNDWATER DISCHARGE PLAN )  
APPLICATION SUBMITTED BY )  
POWERTECH (USA), INC. )

**CERTIFICATE OF SERVICE**

I hereby certify on August 31, 2021, originals of the following documents were served upon Rob Duvall, DANR for filing and a true and correct copy of the following documents:

**POWERTECH'S REPLY BRIEF IN SUPPORT OF MOTION TO AMEND  
PROCEDURAL ORDER AND RESPONSE TO MOTION TO PERMIT  
ELECTRONIC FILING**

were served upon the following individuals by U.S. Mail, postage prepaid:

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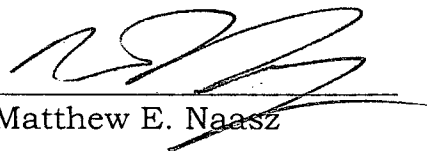
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